

D.A., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS, WRIGHT-PATTERSON
AIR FORCE BASE, OH, Employer**

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**Docket No. 14-365
Issued: June 16, 2014**

Case Submitted on the Record

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On December 6, 2013 appellant, through his attorney, filed a timely appeal from the August 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether OWCP properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on April 5, 1988 appellant, then a 39-year-old aircraft electrician, sustained an acute left shoulder sprain with fibrositis and left biceps tenosynovitis when he slipped while descending a ladder and struck his left shoulder on an airplane hatch. He stopped work on April 8, 1988 and returned to work on May 9, 1988. Appellant had periodic work stoppages until being totally disabled from work beginning October 25, 1989. On April 18, 1991 he underwent a left rotator cuff repair and, on November 18, 1997, he had a left rotator cuff repair with lateral clavical resection. OWCP authorized these procedures. From May 1994 through January 1998, appellant worked in various temporary positions in the private sector. He stopped work in January 1998 and did not return to work for the employing establishment. On August 15, 2000 appellant had an authorized left rotator cuff repair and, on January 6, 2006, he had an authorized debridement for chronic left rotator cuff tear with bicep tenosynovitis.

In December 2007, appellant began to participate in vocational rehabilitation efforts. Doris Graessle, appellant's rehabilitation counselor, formulated a plan under which he would undertake education and training designed to prepare him for work as a computer security specialist or microcomputer support specialist. Appellant started participating in a training program at the New Horizons Computer Learning Centers, Ohio Valley.

In 2009, appellant began to assert that his medical condition prevented him from continuing with vocational rehabilitation efforts. In a July 15, 2009 note, Dr. Donald W. Ames, an attending Board-certified orthopedic surgeon, discussed a July 7, 2009 nonwork-related motor vehicle accident involving appellant. Subjective pain complaints were noted. Dr. Ames noted that appellant reported missing school due to pain. He diagnosed sprain/strain of the rotator cuff, pain in shoulder joint and diabetes mellitus and treated appellant with a left shoulder injection.² Dr. Ames recommended physical therapy and advised appellant to follow up as needed.

By decision dated August 24, 2009, OWCP reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. Appellant's compensation would be based on the difference between his pay rate as determined for compensation purposes and what his wage-earning capacity would have been if he had cooperated with vocational rehabilitation efforts, *i.e.*, his wage-earning capacity as a computer security specialist. OWCP discussed the classes he missed and failure to take a computer certification test. It found that these actions were not excused by appellant's medical condition or any other reason. In a February 4, 2011 decision, OWCP affirmed its August 24, 2009 decision.

In a January 27, 2012 decision,³ the Board affirmed the February 4, 2011 decision noting that OWCP properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his

² In a July 21, 2009 note, Dr. Patrick Jonas, an attending Board-certified family practitioner, stated, "[Motor vehicle accident], multiple injuries, no class/learning encounters until August 7, 2009." In an August 4, 2009 note, he disabled appellant from work through September 1, 2009. On August 17, 2009 Dr. Ames discussed appellant's ongoing subjective pain complaints. He opined that new magnetic resonance imaging (MRI) scan testing revealed "no new injury seen."

³ Docket No. 11-871 (issued January 27, 2012).

loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. The record reflected that appellant obstructed vocational rehabilitation efforts by repeatedly missing training classes designed to qualify him to work in the computer field and by refusing to take computer certification tests required for him to work in that field. In particular, appellant refused to take a certification test in July 2009 which would have allowed him to complete his training program and start a job search. The Board found that his concerns about the computer field and his rehabilitation counselor did not justify his failure to continue participation in vocational rehabilitation efforts. Appellant claimed that a medical condition prevented him from participating in vocational rehabilitation efforts, particularly with regard to the effects of a July 7, 2009 vehicle accident, but none of the physicians of record provided a rationalized opinion, supported by specific findings, clearly showing that he was disabled from all activity or that his medical condition prevented him from participating in vocational rehabilitation efforts, including attending classes or taking tests.⁴ The Board referred to appellant's successful training efforts up until his refusal to continue cooperation and concluded that, but for his obstruction, he would have been able to earn wages as a computer security specialist. The Board determined that OWCP properly adjusted appellant's compensation based on the wages of this position.

Appellant argued that OWCP improperly reduced his compensation in August 2009 under 5 U.S.C. § 8113(b). He also suggested that his current medical condition prevented him from returning to participation in vocational rehabilitation efforts.

In a January 24, 2012 report, Dr. Gregory Fisher, a Board-certified orthopedic surgeon serving as an OWCP referral physician, diagnosed surgery (times four) for failed rotator cuff repair of the left shoulder with evidence of osteoarthritis of the glenohumeral joint and a high riding humeral head. He stated that this diagnosis was related to appellant's accepted conditions and surgeries. Dr. Fisher indicated that the left shoulder surgery recommended by Dr. Robert Nowinski, an attending osteopath and Board-certified orthopedic surgeon, was medically necessary to treat appellant's left shoulder condition.

In an April 25, 2012 letter, Dr. Ames stated that he had treated appellant for years for "severe problems with his left shoulder." He discussed appellant's left shoulder and arm diagnoses and the left shoulder surgeries he underwent between 1991 and 2006. Dr. Ames stated that appellant had been seen on January 24, 2012 by Dr. Fisher who recommended that he have left shoulder surgery performed by Dr. Nowinski. He stated:

"It should be noted that [appellant] has had multiple injections, multiple surgeries and multiple attempts at physical therapy. He has had to discontinue a reeducation training program because he was unable to attend due to severe pain about the shoulder. [Appellant] is not able to use his shoulder in a normal fashion and because of his pain is unable to concentrate on further educational activities at this time."

In a May 2, 2012 report of an April 25, 2012 examination, Dr. Ames indicated that appellant reported experiencing difficulty with sleeping, lifting, reaching forward, reaching out

⁴ The Board noted that the medical reports of record did not show a significant change in appellant's objective medical condition after his vehicular accident.

and working. Appellant noted feeling the same as his last visit four months prior. Dr. Ames diagnosed several left shoulder conditions including osteoarthritis, sprain/strain of the rotator cuff and shoulder joint pain.⁵ He described the steroid injection treatment he administered on appellant's left shoulder. Dr. Ames provided a similar description of appellant's medical condition in a July 30, 2012 report detailing a July 19, 2012 visit.

In a June 7, 2012 report, Dr. Nowinski diagnosed left shoulder arthropathy with recurrent rotator cuff tear, left biceps tendon tear, left capsular contraction and retained hardware. He recommended additional left shoulder surgery. On August 20, 2012 Dr. Nowinski performed a left shoulder reversed total shoulder arthroplasty with Tornier size 42 glenosphere, latissimus dorsi tendon transfer, rotator cuff reconstruction, biceps tenodesis and capsular contracture release. The record also contains reports in which Dr. Nowinski and other attending physicians described appellant's recovery from surgery. In a July 2, 2013 report, Dr. Nowinski indicated that appellant presented with a chief complaint of left shoulder pain. Examination of appellant's left shoulder showed mild global tenderness, lack of instability, intact neurovascular system, full passive motion and 4/5 strength with limited effort. Dr. Nowinski indicated that appellant's surgical implant had good alignment and position without complications and no other surgical care was needed.

Appellant submitted additional documents from 2012 and 2013, including surgery request forms, physical therapy notes, medical prescriptions, nurse reports and laboratory results. He also submitted documents showing that he was a Cisco Certified Entry Networking Technician, valid through March 2, 2012.

In an August 19, 2013 decision, OWCP determined that it properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. It found that the medical evidence dated in 2012 and 2013 did not establish that he was medically unable to participate in vocational rehabilitation efforts when his compensation was adjusted in August 2009. OWCP also found that the medical evidence did not clearly show that appellant's medical condition in 2012 and 2013 prevented him from returning to vocational rehabilitation efforts at that time.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁶ Section 8113(b) of FECA provides that if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of FECA, OWCP, "after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual

⁵ Dr. Ames indicated that appellant's left rotator cuff exhibited severe weakness on examination.

⁶ *Betty F. Wade*, 37 ECAB 556, 565 (1986).

in accordance with what would probably have been his [or her] wage-earning capacity in the absence of the failure,” until the individual in good faith complies with the direction of it.⁷

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions OWCP will take when an employee without good cause fails or refuses to apply for, undergo, participate in or continue to participate in a vocational rehabilitation effort when so directed. Section 10.519(a) provides, in pertinent part:

“Where a suitable job has been identified, OWCP will reduce the employee’s future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. It will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with OWCP nurse and the employ[ing] [establishment]. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.”⁸

As medical questions that can only be resolved by medical opinion evidence, the reports of a nonphysician (such as a nurse or physical therapist) cannot be considered by the Board in adjudicating such matters.⁹

ANALYSIS

OWCP accepted that on April 5, 1988, appellant sustained an acute left shoulder sprain with fibrositis and left biceps tenosynovitis due to slipping while descending a ladder and hitting his left shoulder on an airplane hatch. He last worked in January 1998 and has not returned to work for the employing establishment. Beginning in 1991, appellant underwent several left shoulder surgeries which were authorized by OWCP.

By decision dated August 24, 2009, OWCP reduced appellant’s compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. In a February 4, 2011 decision, it affirmed its August 24, 2009 decision. In a January 27, 2012 decision,¹⁰ the Board affirmed the February 4, 2011 decision noting that OWCP properly reduced appellant’s compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

Following the prior appeal, appellant contended that OWCP improperly reduced his compensation under 5 U.S.C. § 8113(b) in August 2009. He suggested that his current medical condition prevented him from participating in vocational rehabilitation efforts. The Board finds

⁷ 5 U.S.C. § 8113(b).

⁸ 20 C.F.R. § 10.519(a).

⁹ *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

¹⁰ *Supra* note 3.

that the evidence submitted by appellant does not show that OWCP improperly reduced his compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. The more recent medical evidence submitted by appellant describes his medical condition in 2012 and 2013 and therefore is not relevant to his claim that his medical condition in mid-2009 prevented him from continuing his participation in vocational rehabilitation efforts at that time. As discussed by the Board in its January 27, 2012 decision, appellant had not previously submitted rationalized medical evidence showing that his medical condition justified his stopping of vocational rehabilitation efforts in mid-2009. Moreover, although the medical evidence shows that he continued to have left shoulder problems in 2012 and 2013, the new evidence submitted by appellant does not contain a clear, rationalized opinion that he was medically prohibited from returning to a vocational rehabilitation program in 2012 or 2013.

In a January 24, 2012 report, Dr. Fisher, a Board-certified orthopedic surgeon serving as an OWCP referral physician, diagnosed surgery (times four) for failed rotator cuff repair of the left shoulder with evidence of osteoarthritis of the glenohumeral joint and a high riding humeral head. He recommended that appellant undergo left shoulder surgery. However, Dr. Fisher's report is of limited probative value on the relevant issue of the present case because he did not provide any opinion that appellant could not engage in vocational rehabilitation efforts.

In an April 25, 2012 letter, Dr. Ames, an attending Board-certified orthopedic surgeon, indicated that it had been recommended that appellant undergo left shoulder surgery. He noted that appellant underwent multiple injections, surgeries and multiple attempts at physical therapy and stated:

“[Appellant] has had to discontinue a reeducation training program because he was unable to attend due to severe pain about the shoulder. He is not able to use his shoulder in a normal fashion and because of his pain is unable to concentrate on further educational activities at this time.”

The Board notes that this letter does not provide sufficient medical opinion that appellant could not engage in any vocational rehabilitation efforts. Dr. Ames did not explain how objective findings on physical examination and diagnostic testing prevented appellant from engaging in the limited requirements of vocational rehabilitation activities, such as communicating with a vocational rehabilitation counselor or engaging in retraining. In a May 2, 2012 report of an April 25, 2012 examination, he noted that appellant had some left shoulder limitations, such as left rotator cuff weakness, but he did not indicate that he was prohibited from all activity. Dr. Ames provided a similar description of appellant's medical condition in a July 30, 2012 report detailing a July 19, 2012 visit.

On August 20, 2012 Dr. Nowinski, an attending osteopath and Board-certified orthopedic surgeon, performed several surgical procedures on appellant's left shoulder. However, neither he nor other attending physicians who treated appellant in the postsurgery period provided a clear opinion that appellant could not return to vocational rehabilitation efforts for any specific period. The medical evidence indicates that appellant's left shoulder surgery was successful and left him with few left shoulder deficits. Appellant submitted numerous additional documents from 2012 and 2013 including surgery request forms, physical therapy notes, medication records,

nurse reports and laboratory results. However, these documents produced by nonphysicians do not constitute probative medical evidence with respect to the medical question of whether appellant was physically capable of participating in vocational rehabilitation efforts.¹¹

For these reasons, the evidence submitted by appellant does not establish that OWCP improperly reduced his compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.¹²

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2014
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹¹ See *supra* note 9.

¹² Moreover, appellant's successful training efforts up until his refusal to continue cooperation showed that, but for his obstruction, he would have been able to earn wages as a computer security specialist. OWCP properly adjusted his compensation based on the wages of this position. See *supra* note 7.